2. Upon appeal to the Commission by counsel supporting the complaint, the Commission on May 27, 1958, with former Chairman Gwynne dissenting, held that a prima facie case in support of the complaint had been established, and issued its order vacating the initial decision and remanding the case to the hearing examiner for further proceedings. Since the remand, numerous hearings have been held and a large volume of evidence, both oral and documentary, introduced by respondent. Certain rebuttal evidence in support of the complaint has also been introduced. Proposed findings and conclusions have been submitted, together with supporting briefs. Oral argument has been waived, and the case is now before the hearing examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected.

3. Respondent is the largest manufacturer and seller of tapered roller bearings in the United States. It sells such bearings to manufacturers of automobiles, tractors and other machinery for use as original equipment, and it also sells large quantities of bearings to independent distributors and jobbers who resell them to automotive parts dealers, repair shops and industrial plants. The latter bearings are used for replacement and repair purposes in automobiles and other machines. This phase of respondent's business is in what is known as the replacement market and is the only phase involved in the present proceeding. The proceeding has no relation to sales of bearings for use as original equipment.

4. In the replacement market, respondent sells to two general classes of customers, whom it designates as authorized distributors and authorized jobbers. The distinction between the two, speaking generally, is that the distributor usually carries a larger and

more complete stock of bearings and deals with respondent direct; whereas the jobber carries a more restricted stock and obtains his bearings from an authorized distributor rather than from respondent direct. The distributors and jobbers pay the same price for the bearings; however, on all sales made by distributors to jobbers the distributor is given a specified credit by respondent.

The maintenance of a large inventory of tapered roller bearings requires a very substantial amount of capital, and a dealer may find it to his advantage to act as a jobber only, carrying a smaller stock and replenishing it from time to time by purchasing from an authorized distributor. Not infrequently a jobber, for reasons of his own, will wish to become a distributor, and similarly distributors sometimes prefer to relinquish that status and act as jobbers only. Respondent's distributors and jobbers' number some seven thousand, being divided about equally as between distributors and jobbers.

5. Subject to certain qualifications to be noted later, dealers in tapered roller bearings for replacement purposes usually are inclined to handle only one line or brand of such bearings. This is so because tapered roller bearings made by the various manufacturers are interchangeable in any particular size and type. In fact, the various manufacturers use the same numbering system. Thus an automobile bearing made by one manufacturer which wears out or proves defective may be replaced by a bearing of the same number made by another manufacturer. The stocking by a dealer of more than one line of tapered roller bearings would therefore increase his investment without affording him any appreciable benefit.

6. Respondent enters into written contracts with both its distributors and its jobbers, and copies of

such contracts appear in the record. Examination of these contracts discloses nothing which can reasonably be construed as an exclusive-dealing requirement. If there is a case in support of the complaint it must be found in other documents in the record, particularly intra-company correspondence between respondent and its sales personnel, and certain intra-company reports evidencing cancellation by respondent of contracts with distributors and jobbers.

7. Very little of the correspondence has any real probative value on the issue of exclusive dealing. Most of it consists of routine, day-to-day reports or memoranda such as would ordinarily be sent in by sales representatives to their employer, supplying information as to sales efforts, activities of competitors, etc. While some of the correspondence, considered alone, would indicate exclusive-dealing arrangements between respondent and certain customers, the probative value of the communications is materially weakened as a result of testimony giving the circumstances under which the correspondence took place. At best the documents represent only a relatively small number of isolated instances; they are wholly insufficient to establish a general policy of exclusive dealing on the part of respondent.

8. Any probative value which the cancellation reports might originally have had has been destroyed as a result of evidence received since the remand. Under respondent's routine procedure, when the contract of a distributor or jobber is cancelled for any reason, a report of the cancellation is prepared for intra-company information and use. The record contains some 113 such reports. The report form includes a question reading: "Why is this account being cancelled?", and in many of the reports this question is followed by such answers as "Took on Bower", "Have taken on

Bower through Federal-Mogul", "Buying Bower", "Taken on ABC line", and "Handling Hoover and ABC". It is these statements which are relied upon by Commission counsel to show the maintenance by respondent of an exclusive-dealing policy.

9. The record now establishes beyond question that in every instance evidenced by the cancellation reports the initiative in severing the relationship was taken by the customer rather than by respondent. In every instance the customer had either (1) made no purchases whatever, or practically none, for months, even years, immediately preceding the cancellation; or (2) had informed respondent through its sales representatives that he had decided to take on a competitive line and discontinue the Timken line. In short, Timken did not quit the customers; the customers quit Timken.

10. A variety of reasons were assigned by the distributors and jobbers for electing to handle another line. A number were impressed by the fact that Federal-Mogul-Bower, one of respondent's principal competitors, maintains some 81 warehouses in most of the principal cities in the United States, and that purchasers can supply most of their needs from these warehouses and thus obviate the necessity of carrying a large inventory. Others were motivated by personal reasons. Probably the principal reason, so far as jobber customers were concerned, was that until a few years ago Timken sold to authorized distributors at a lower price (or a larger discount) than to authorized jobbers. Consequently jobbers, unless they could obtain distributor status, were frequently inclined to seek other sources of supply.

11. Among the witnesses testifying on behalf of respondent were the present and former General Managers of its Service and Sales Division, all of the

Branch Managers of its seventeen branch offices, and some twenty salesmen. All testified unequivocally that Timken has no policy requiring exclusive dealing on the part of its distributors and jobbers; that all the company expects of its distributors and jobbers is that in promoting the sale of tapered roller bearings they will devote their primary or principal sales efforts to the Timken line; that as a matter of fact the majority of Timken distributors and jobbers do handle competing bearings without any interference on the part of Timken.

While, as already stated, bearing dealers usually are inclined to handle only one line, there frequently are occasions when for various reasons they will handle a relatively small number of other bearings. They may have customers who prefer a different brand; or there may be a delay in obtaining bearings in their primary line; or, after changing to a new line, they may have bearings left over from the original line; or they may be exceptions to the general rule and may prefer to stock more than one line.

In appraising the probative value of the testimony of Timken executives and salesmen there should, of course, be taken into account the fact that they have an interest in the proceeding. This fact, however, affords no reason for rejecting the testimony. On the contrary, the hearing examiner was impressed with the character and demeanor of the witnesses; he believes their testimony.

12. Also testifying on behalf of respondent were some thirty-seven Timken distributors and jobbers, widely scattered throughout the United States. In substance their testimony was that while Timken was their primary line they frequently handled competing bearings and felt entirely free to do so; that no threats of cancellation had ever been made by Tim-

ken, nor any other interference attempted. Here again the examiner was impressed with the witnesses and believes their testimony.

13. Among the reasons given by the witnesses for preferring the Timken line were the high quality of the products, the completeness of the line, and the fact that the line is well known and has high consumer acceptance.

14. The only distributor or jobber witness giving testimony adverse to respondent was Peter Pakulak, a former jobber of Timken in San Francisco, California, who, with a co-partner, operates a bearing business under the name Bearing Distributing Company. Pakulak was offered by Commission counsel as a rebuttal witness, his testimony, by agreement of counsel, being taken during the course of respondent's case.

Pakulak testified that he had been an authorized Timken jobber for several years immediately preceding April 1951. While he had also sold Bower bearings from time to time, he had never stocked them but apparently obtained them from the Bower local warehouse as needed. In April 1951, he, along with several other bearing dealers, filed bids with the City of San Francisco on a quantity of bearings which the city desired to purchase. Pakulak filed bids on both Timken and Bower bearings, the two bids being identical. In fact, the bids of all bidders were identical, and in such a situation it was the practice of the city to award the contract by lot; specifically, by letting the bidders draw numbered balls from a receptacle. As a result of the drawing, Pakulak was awarded the contract on the Bower bearings, but not on the Timken bearings.

Pakulak testified further that about ten days after he was awarded the contract on the Bower bearings,

William G. Turner, Branch Manager of Timken's San Francisco branch, called on him, that there was a conversation between the two regarding the Bower bid and that during the course of the conversation Turner called Pakulak and his partner "Chiseling Bums." Turner in his own testimony denied using this language. Further testimony of Pakulak was that a few days after the conversation his contract with Timken was cancelled, and that he attributed the cancellation to his bid on the Bower bearings.

According to a written statement prepared by Pakulak, his purchases of Timken bearings amounted to $8,595.96 in 1948; $6,768.24 in 1949; $5,910.62 in 1950; and $2,193.96 during the period in 1951 before his contract was cancelled.

Subsequent to the cancellation, Pakulak brought suit against Timken and certain other parties for damages. It appears, however, that the suit was not based on the cancellation, but charged a price-fixing combination among Timken and the other defendants. The present record does not disclose the outcome of that litigation.

15. Turner's version of the incident was that he called on Pakulak because it seemed strange to him that Pakulak, who was representing himself as an authorized jobber of Timken bearings and who, according to Turner's information, was not representing Bower, should nevertheless make a bid on Bower bearings; that Pakulak's contract was not cancelled because of the Bower bid, but because Pakulak was regarded as an unsatisfactory jobber; that the volume of business done by him in Timken bearings was insufficient; that he did not maintain an adequate stock of Timken bearings as provided in his contract; and that in these circumstances it was not fair to other Timken jobbers and distributors in that area to con-

tinue Pakulak as a jobber, when the other jobbers and distributors were carrying out their contractual obligations to maintain adequate inventories.

16. Assuming for present purposes that Pakulak's version is correct and that the cancellation was due to the Bower bid, the incident would appear to represent at most only a single, isolated instance, and to have no significant probative value on the question whether Timken maintains a policy of exclusive dealing.

17. In calling on Timken distributors and jobbers, respondent's salesmen frequently check their stock, and Commission counsel urge that this constitutes policing of the dealers and indicates the maintenance by respondent of a policy of exclusive dealing. The record affords no basis for such an inference. There are several reasons why Timken may properly be interested in the stocks of its dealers. In the first place, the dealers' contracts provide that they shall maintain adequate inventories. Also, Timken has an "obsolescence" policy under which its distributors and jobbers may return and receive credit for a specified percentage of old and unsold bearings. Timken salesmen can be of material assistance to the dealer in identifying such bearings. Finally, it must be remembered that the primary purpose of the salesman's call is to sell bearings. By checking the stock, he can bring to the dealer's attention gaps and shortages in the stock and thereby possibly obtain an order.

No instance is disclosed in which any distributor or jobber has complained of the practice. On the contrary the practice would appear to be of substantial benefit to the dealers.

18. In the consideration of cases charging violation of Section 3 of the Clayton Act, certain fundamental principles must constantly be kept in mind. The first is that there is a clear distinction between, on the one

hand, the selling of goods on the condition proscribed by the statute and, on the other hand, the right of a seller to push his own goods and, if he can, to induce or persuade purchasers to handle his goods exclusively. In no sense is the latter a violation of law.

19. But even more important and fundamental is the principle that a seller has the right to select his own customers—to sell or to decline to sell as he chooses. Just as a buyer may cease buying from a seller at any time and for any reason, so a seller has the right to discontinue selling to a customer at any time and for any reason, including the reason that the customer is handling a competing line of goods. The only requirement of the statute is that if the seller does elect to sell or to continue to sell, the transaction must not be "on the condition, agreement, or understanding" that the customer will not deal in the goods of a competitor. Evidence of instances of discontinuance of selling is received in a proceeding of this kind, not because the discontinuance is in itself illegal, but solely because such evidence may assist in resolving the question whether the seller is maintaining a policy of selling on the condition forbidden by the statute.

20. Clearly in the present case the record wholly fails to establish the existence of such a policy.

21. The conclusion reached upon this issue renders unnecessary any consideration of other issues.

CONCLUSION

The complaint has not been sustained.

ORDER

IT IS ORDERED that the complaint be, and it hereby is, dismissed.

WILLIAM L. PACK,
Hearing Examiner.

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In the Supreme Court of the United States

Case No. 255.

OCTOBER TERM, 1962.

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

THE TIMKEN ROLLER BEARING COMPANY,

Respondent.

BRIEF FILED ON BEHALF OF THE TIMKEN ROLLER BEARING COMPANY

In Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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BRIEF FILED ON BEHALF OF THE TIMKEN ROLLER BEARING COMPANY In Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

PRELIMINARY STATEMENT.

This brief is filed on behalf of The Timken Roller Bearing Company (herein generally referred to as "Timken" or "Respondent") in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, filed by the Solicitor General on behalf of the Federal Trade Commission (herein called the Commission) in the above captioned case.

QUESTIONS PRESENTED.

There are actually no questions of law presented to the Court in this case, and a proper statement regarding this case should be phrased in this fashion:

1. This case involves nothing more than one wherein a decision of the Federal Trade Commission was reversed by a reviewing Court of Appeals when it could not con-

scientiously find substantial evidence to support that decision "when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Commission's view";

2. This case presents no question as to whether the size of respondent should be given any weight in appraising the evidence that was offered in this case.

THE BACKGROUND OF THE CASE.

The Charge Contained in the Commission's Complaint.

The essence of the Commission's charge in this case is contained in paragraph 6 of the Complaint which is as follows:

> "Paragraph Six. In the course and conduct of its business respondent has made and is now making sales and contracts for sale of its tapered roller bearings, and has fixed and is now fixing a price charged therefor or discount from or rebate upon such price, on the *condition, agreement or understanding that the purchasers thereof shall not use or deal in like or similar tapered roller bearings sold or supplied by a competitor or competitors of respondent.* Respondent has *followed a consistent policy of requiring* distributors and jobbers to whom it sells its tapered roller bearings for resale, *to discontinue handling like or similar products supplied or sold by any competitor or competitors of respondent and not to handle any such products except those sold to such distributors and jobbers* by respondent." (Emphasis added.)

It is clear from this language that it was charged that *without exception* Timken purchasers are *required* as a condition of sale (1) not to deal in the bearings of competitors and (2) to discontinue handling competitors' products and not to handle *any* such products except those sold to distributors and jobbers by Timken.

The interpretation of the language of the Complaint by counsel supporting the Complaint was equally precise. Samples of various statements made during the course of the hearing by counsel are collected in III P. A. pp. 791a-798a.* Reference to one is sufficient for our purpose in this brief. In referring to Commission's Exhibit 11, Parts Service Company, III P. A. p. 644a, he said

> "* * * A man makes up his mind that he is going to handle something else, but he doesn't make up his mind that he is going to discontinue handling the Timken line completely. It is Timken who makes up his mind for him. *Every time they catch a jobber or distributor handling competitive products* the Timken Company, not the jobber or distributor, makes up his mind for him." (Emphasis added.) (III P. A. 794a.)

Thus, the Commission's original position was that, without qualification or exception, Timken *required* all its distributors or jobbers to handle Timken bearings to the complete exclusion of any competitors' products, and terminated its contracts with any distributor or jobber who did not comply with this requirement.

STATEMENT OF FACTS.

In determining whether the Court of Appeals appropriately dealt with the record *in its entirety in this*

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* The rules of the Court of Appeals for the Sixth Circuit provide that each party may have printed such portions of the record as it deems material to the questions presented in respect of the agency Order that the Court is being asked to review. In the rules of that Court, the record so printed is called an Appendix. The respondent prepared an Appendix of three volumes with pages running from 1a through 819a. Copies of that Appendix have been filed with this Court in connection with the Petition for a Writ of Certiorari. On pages I through VII of the first volume of the Appendix there is a statement regarding the arrangement of this printed Appendix. References to the Appendix in this brief will be shown as P. A. p.

case, several basic, important matters, well established by the evidence in this case, must be borne in mind. Many of these the Commission completely ignored; and in some instances its "findings" or "conclusions" were directly contrary to evidence which was virtually undisputed.

First, there is no provision in the written agreements between Timken and its authorized distributors and jobbers which requires them to sell Timken tapered roller bearings exclusively. Therefore, if any violation of Section 3 could be found from the record in this case, it must be from evidence that as a matter of *regularly followed practice* and "consistent policy" (to use the language of the Complaint) Timken has imposed such requirement. Opinion of the Commission, I P. A. 21a, 45a.

Second, there is no evidence in this case of any general policy statement, written or otherwise, by any responsible officer of Timken to the effect that authorized distributors and authorized jobbers are required to sell Timken roller bearings exclusively. On the contrary, the present and former managers of Timken's Service and Sales Division and the managers at all the 17 branches of Timken's Service and Sales Division testified that it has *not* been Timken's policy to require distributors and jobbers to handle Timken roller bearings exclusively. (P. A. pages 163a-164a; 180a-181a; 188a-189a; 201a-202a.) At least 23 sales representatives attached to various Timken branches who were called as witnesses in this case testified to the same effect.

The Relevant Market.

The Timken Roller Bearing Company is engaged in the manufacture of tapered roller bearings. This case involved only a small segment of the business of the Company, namely, sales for the replacement market. It has

nothing to do with sales for installation in original equipment.

While the Commission studiously avoided any reference to this point, the record shows that original equipment manufacturers who produce such products as automobiles, trucks, buses, farm machinery and other types of industrial machinery maintain their own dealer organizations who stock and sell tapered bearings in the replacement market. There is nothing in the record that shows with any preciseness what percentage of the replacement market is handled through the dealer organizations of the original equipment manufacturers.

Because of the fact that Timken does not believe that these dealer organizations always have available replacement bearings every place that they may be needed, Timken maintains and operates its own independent distributing organization for purposes of sales in the replacement market. Other manufacturers of tapered roller bearings in the United States, Federal-Mogul-Bower, Tyson Bearing Company (a subsidiary of SKF Industries), Hyatt Division of General Motors, the Kay-Don Company, to mention some of them, also sell tapered bearings in the replacement market through their own methods of maintaining independent outlets for service bearings. In most instances the methods followed by Timken's competitors for the sale of bearings in the replacement market are not entirely the same as those employed by Timken.

The Timken Service-Sales Organization.

A brief description of the Timken Service-Sales Organization would be helpful at this point. Timken had under contract at the time the record was made up in this case approximately 7,000 distributors and jobbers. The distributors purchase bearings for sale in the replacement

market from 17 Timken branches located in 17 different cities in the United States. The jobbers do not deal directly with Timken branches but purchase their bearings for resale from Timken distributors.

The fundamental purpose of any bearing distribution system in the replacement market is to have a stock of bearings readily available in the event of a bearing failure in a piece of equipment. If a user of equipment in which a Timken bearing has been installed has his equipment rendered immobile by a bearing failure and none is immediately available to replace it, the Timken reputation is not enhanced. As a consequence, Timken's contracts with its distributors and jobbers require them to carry an adequate stock of Timken bearings.

Competitors of Timken follow different methods of distribution in the replacement market. For example, Federal-Mogul-Bower, instead of relying upon distributors to carry substantial stocks of bearings as a source of supply, as does Timken, has 81 warehouses in most of the principal cities of the United States and Canada. (P. A. pp. 304a-305a.) This system renders unnecessary the carrying by dealers of any substantial inventory of Bower bearings.

The Practice of Distributors and Jobbers Carrying Primarily Only One Line of Tapered Roller Bearings in Their Inventories.

In appraising the Opinion of the Court of Appeals, as well as that of the Commission, it is important to understand that the practice generally followed by dealers in the replacement market is to handle only one line of a given kind of merchandise. That is to say, dealers do not generally carry two complete lines of automotive parts, such as

fan belts, gaskets, mufflers, piston rings—or of tapered roller bearings. In support of this statement, there were 15 Timken distributors and jobbers with broad experience in the industry who so testified and there was no rebuttal of this evidence as to this being the general practice. Forty-two Timken personnel dealt similarly with the same point. (I P. A. pp. 138a-248a.) For example, we refer the Court to the testimony of Barry Hogarty, President of Bearing Supply Company, referred to in Commission's Exhibit 139-A & B on P. A. pp. 397a-398a; also to the testimony of Mr. Eugene Green of Green Motor Parts referred to in Commission's Exhibit 73 and reproduced on P. A. p. 315a. There were numerous other instances in the record of dealers who testified that as a matter of *their own business judgment*, and *not* because of any *requirement or policy of Timken* or any other supplier, they handled only one line of any product.

This was particularly so in respect of tapered bearings for a practical reason.

The reason was that in identifying the different sizes and types of tapered roller bearings, a bearing marked "234" manufactured by Timken would bear exactly the same number, and have the same dimensions, if manufactured by Federal-Mogul-Bower or by SKF-Tyson. Hyatt has its own system of numerology on part numbers, but Timken has part numbers that are size for size the same as the Hyatt part numbers. Thus, if a dealer were to handle three or four lines of tapered roller bearings, he would simply be multiplying his investment by the different makes carried, and the bearings would be identical in size and all similarly marked.

The Hearing Examiner heard the testimony of the witnesses and in paragraph 5 of his Initial Decision found that:

"Dealers in tapered roller bearings usually are inclined to handle only one line or brand of such bearings."

The Court of Appeals dealt with the same point and said:

"Finally, the evidence showed the custom in the bearing resale industry to be the stocking of only one brand of bearings, because of the prohibitive inventory cost of carrying more than one brand of the same bearing in stock."

Even a casual examination of the record supports this conclusion. In contrast, the Commission in its Opinion said that:

"While there is evidence that *certain* replacement parts dealers elect to handle only one line, we are not convinced that this is the practice generally followed by all members of the industry." (Emphasis added.)

In support of this "conclusion" (if one can so denominate such a lack of conviction), the Commission relied upon the testimony of only *one witness*, a Timken jobber, who said that in his opinion it was a good idea to handle more than one brand of tapered roller bearings in stock. (Eggeman, Original Record, pp. 1523-25, 1536.) It should be noted that he was the *only* witness who so testified.

Parenthetically it might be observed that if he *was* handling, *as he said*, more than one line of tapered bearings, it should have been obvious to the Commission that this represented strong evidence that Timken was *not* enforcing any exclusive dealing policy as to him!

The Timken Discount Differential Between Distributors and Jobbers.

The form of the Timken distributor-jobber organization was established in 1946; and from 1946 until 1955 there was a discount differential on the prices paid by Timken authorized distributors as against the price paid by authorized jobbers. (Resp. Ex. 20, III P. A. 819a.) In many cases jobbers during this period became unhappy with their Timken connection because of this discount differential, and many of them decided to stop handling Timken bearings because they could buy bearings at the better discount from Federal-Mogul-Bower.

There was another consideration also involved in this situation, namely, that in many instances where bearings were not an important part of the business of the distributor or jobber, buying from a Federal-Mogul-Bower warehouse close to the distributor-jobber's place of business obviated the necessity of carrying a large stock of bearings.

While this was entirely undisputed, it was one of the numerous points completely disregarded by the Commission.

It is against this backdrop that the Court of Appeals had to make an appraisal of *all* the evidence that was offered in the trial of this case, not just that offered by the Commission.

REASONS FOR DENYING THE WRIT.

The Court of Appeals Applied the Correct Rule in Reviewing the Findings of the Commission.

It is stated in the brief filed in support of the petition in this case that the Court below failed to make a thorough assessment of the record and substituted its own evaluation of the weight of the evidence for that of the Commission, and thereby grossly misapplied the statutory standard

governing judicial review of agency findings. It is also suggested that this case presented a rare instance in which the standard for judicial review of agency findings has "been misapprehended or grossly misapplied."

On the contrary, it is abundantly apparent from the Opinion of Judge Martin, who spoke for the Court of Appeals for the Sixth Circuit in this case, that he was fully aware of what he called "our limited scope of review." (290 F. 2d 839 at 841.) Prior to that he referred to the rule laid down by this Court in *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474. (290 F. 2d 839 at 841.) No reason is suggested as to *why* the Court did not understand the rule of *Universal Camera*, nor is any statement by the Court of Appeals cited as evidence that it *did* not understand that rule or misapplied it.

In that case, this Court indicated that Congress had charged the Courts of Appeals with the primary responsibility of examining the records on appeals taken from administrative agencies, and that when a case was before this Court on certiorari, the Court would determine only whether there had been a fair assessment of the record by the Court of Appeals and would not make an independent review of the record reviewed by the Court of Appeals.

It is not suggested any place in the brief filed in support of the petition that there is any conflict between the Opinion of the Court of Appeals in this case and the Opinion of any other Court of Appeals in a comparable case. There is no question of principle involved in this case, the settlement of which has any public importance. In the final analysis, what is being sought in this case on behalf of the Commission is a de novo review in this Court of the review by the Court of Appeals. It is perfectly

obvious from an examination of the record in the case and the Opinion of the Court of Appeals and a consideration of the Opinion of the Commission that had that Court permitted the Order and Findings of the Commission to stand, an egregious error would have been committed.

An examination of the Commission's Opinion showed that it had with "studied design" ignored all evidence presented by the respondent and had acted arbitrarily in connection with the evidence offered by the Commission. *National Labor Relations Board vs. Laister-Kaufman Aircraft Corporation,* 144 Fed. 2d 9. The practice of the Commission in referring to only bits of the evidence, as was stated by the Court of Appeals in the Second Circuit, created a serious "suspicion as to objectivity necessarily arising from so gross an understatement." *National Labor Relations Board vs. Superior Fireproof Door and Sash Company, Inc.*, 289 Fed. 2d, 713. The present case resembles *Tag Mfrs. Institute vs. Federal Trade Commission*, 174 Fed. 2d, 452, where that Court reversed a decision of the Federal Trade Commission (in which the Commission had held that because of agreements among various manufacturers there was "substantial uniformity of prices"), with the observation that:

> "In the first place, this implies that the instances of departure from uniformity are insignificant and unsubstantial—which certainly cannot be said."

The Court noted in that case that the evidence showed over 400 instances in which two or more manufacturers quoted off-list prices to the same customer at the same time on the same piece of business, and then the Court said:

> "Not a single buyer was called by the Commission as a witness to testify that he tried shopping around on a price basis among two or more manufacturers and was met by uniformity of price quotations."

In this case, likewise, the Commission looked only at bits of evidence to sustain its conclusions. It simply shut its eyes to the great mass of testimony that completely destroyed any semblance of a case in support of its Complaint, and at no time did it call any witnesses that could have testified concerning the situation.

Before looking at the record, we would direct the attention of the Court to one circumstance that seems to us to be of compelling importance, and that is the action of the Hearing Examiner who heard all the evidence offered in the case. Little, if anything, is said about his opinion in the brief filed in this Court.

The Commission's case consisted of two sets of documents. They were (1) cancellation reports that dealt with the cancellation of a few "distributors" but in the main of "jobbers" and (2) reports from Timken salesmen and branch managers in the field dealing with a variety of situations involving dealers and potential dealers and comments on these reports by various Timken representatives in the home office. We shall deal with the content and character of these reports at a later point in this brief.

In presenting its defense, Timken had one or more witnesses to testify concerning the facts and circumstances referred to in each of the Commission's exhibits. The testimony of the Timken witnesses clearly negated any claim of exclusive dealing in respect of the matters referred to in the Commission's exhibits. If the testimony of the Timken witnesses is believed, the Commission's case was destroyed. Thus the credibility of the witnesses was of vital importance in the appraisal of the entire record in the case.

In *Universal Camera Corporation, supra*, this Court considered at some length the weight that was to be given to an Examiner's report in the review of an agency's find-

ing by a Court of Appeals. The observation was made on page 494 of this Court's opinion that:

> "On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown."

On page 496 of the Opinion the Court further observed, among other things, that:

> "The significance of his report, of course, depends largely on the importance of credibility in the particular case."

The Hearing Examiner in the present case saw the witnesses, observed their demeanor on the witness stand, and considered the manner in which they testified. In his Opinion, in appraising the testimony of the witnesses who were called by respondent, he said:

> "In appraising the probative value of the testimony of Timken executives and salesmen there should, of course, be taken into account the fact that they have an interest in the proceeding. This fact, however, affords no reason for rejecting the testimony. On the contrary, the hearing examiner was impressed with the character and demeanor of the witnesses; he believes their testimony." (I P. A. p. 35a.)

In addition to the executives and salesmen of Timken who testified, there were 37 Timken distributors and jobbers, widely scattered throughout the United States, who testified before the Hearing Examiner. In commenting upon this testimony, the Hearing Examiner said:

> "In substance their testimony was that while Timken was their primary line they frequently handled competing bearings and felt entirely free to do so; that no threats of cancellation had ever been made by Tim-

ken, nor any other interference attempted. Here again the examiner was impressed with the witnesses and believes their testimony." (I P. A. p. 35a.)

Surely the testimony of the witnesses was entitled to careful consideration by the Commission, considering the comments made by the Hearing Examiner. An examination of the Commission's Opinion indicates that no consideration was given to the Hearing Examiner's conclusions as to respondent's witnesses, much less any consideration of their testimony.

The Court of Appeals obviously agreed with the conclusions of the Hearing Examiner.

A word about the Commission's argument that the principle enunciated by this Court in *United States vs. United States Gypsum Co.*, 333 U. S. 364, has application here. In that case the rule was announced in this language:

> "Where counsel on both direct examination and cross-examination were permitted to phrase their questions in extremely leading form, so that import of testimony was conflicting, and where such testimony was in conflict with contemporaneous documents, and where case was tried to the court, the Supreme Court on appeal could give such testimony little weight, particularly where crucial issues involved mixed questions of law and fact."

The inapplicability of that rule to the situation involved here is readily apparent. One of the most important items of evidence were the data involving lack of sales to most of the cancelled accounts. Certainly there could be no variance between the oral testimony of witnesses and these figures for admittedly they were taken from the Company's records and were accepted in evidence without objection by counsel for the Commission.

There could be no variance between the testimony of the thirty-odd distributors and jobbers who indicated that

they continued to handle competing bearings without any threats of cancellation by Timken and the Commission's exhibits.

There was no written contract of exclusive dealing, and consequently there could not be any variance between the testimony of the forty-odd Timken witnesses who said Timken had no exclusive dealing policy and the terms and provisions of any written contract.

Fundamentally, it was a matter of the credibility of the witnesses, to be gauged by their demeanor and manner on the witness stand, and not a matter of variance between what they had to say and what any written documents imported.

The Commission's Case and the Evidence Which Destroyed its Probative value.

One portion of the evidence offered by the Commission—and this represented the great bulk of the evidence offered, although almost nothing is said about it in the brief filed before this Court—were reports of cancellations of approximately 100 accounts.

We think the assumption may be fairly made that the writer of the brief filed in this Court was not impressed in the least with this group of exhibits when viewed in the light of the Timken testimony that related to them. The comments about these exhibits are extremely meager and start in the middle of page 11 of the Commission's brief and are concluded in the middle of page 12.

The report forms contained the question: "Why is this account being cancelled?" The answers to this question on the copies of the forms introduced in evidence covered a wide range of salesmen's cliches. There were such statements as "Has GYP and Bower in his stock and refuses to get rid of same"; "Took on Bower"; "Have signed

with Bower"; "Buying ABC due to price"; "Taking on Ahlberg-Bower setup"; "Has become Bower AD"; "Signed direct Federal-Mogul-Bower contract"; "Handling Tyson direct"; "Has elected to take on competitive line"; "Elected to take on Bower"; "Stocking GYP bearings"; "Will handle Bower on direct basis."

The foregoing are samples taken at random from the exhibits offered by the Commission. We respectfully refer the Court to the resume of the evidence pertaining to 79 accounts referred to in Commission's exhibits and findings that appear in Appendix Section 8 at III P. A. pp. 751a-777a. A full reproduction of all the testimony relating to other accounts appears at Appendix Section 6 at II P. A., pp. 255a-561a, and Appendix Section 7, III P. A. pp. 563a-750a. A casual reading of the answers to the questions show that at best they are of such a nature that oral testimony of the facts and circumstances was necessary to make them meaningful. Where the statement is made, for example, "Took on Bower," does that mean to the exclusion of Timken? Does it mean that the distributor or jobber in question had 25% Bower in his stock and 75% Timken or no Timken and all Bower? Does it mean that he told the Timken representative who made the report at the time it was made that he was going to discontinue the handling of Timken bearings? Does it mean that he intended to put little or no sales effort on Timken products?

All these questions are of importance in appraising the pertinency of this testimony on whether Timken was following a "*consistent policy*" of exclusive dealing.

In presenting its defense, after the Commission's testimony was all in the record, the respondent produced witnesses, one or more, who testified concerning the circumstances involved in respect of each of the transactions re-

ferred to in the evidence offered by the Commission. The testimony showed the facts and circumstances surrounding the cancellation, the condition of the stock of the cancelled account at the time the cancellation took place, and the purchase record of the account.

It is perfectly apparent that if the record showed that these people decided to handle bearings made by another manufacturer in lieu of Timken, and stopped buying Timken bearings *voluntarily* and for business reasons that were good and sufficient to them, the Commission's case fell flat to the ground. Indeed, the Court of Appeals recognized this very clearly for on page 841 of its opinion, 290 F. 2d 839, the Court said:

> "The evidence also showed that in every case where a dealer's account was cancelled, that dealer had bought no Timken bearings, or almost none, for a long period of time before the cancellation."

There were, of course, many reasons why various distributors and jobbers decided to discontinue handling the Timken line. The one that was brought out by the evidence in perhaps more instances than any other was that the Timken discount to jobbers was not as favorable from 1946 until 1955 as could be obtained from other sellers. (p. 9, *supra*). In some instances the distributor or jobber decided that he did not wish to carry an adequate stock of Timken bearings, and the ready availability of a Federal-Mogul-Bower warehouse in his area made the carrying of the Timken line undesirable. In other instances the distributor or jobber, usually the latter, was doing a poor job and especially so by handling what are called in the record "Gyp bearings" or "surplus bearings." (See the discussion of the testimony of the Los Angeles Branch Manager who gave the reasons why Timken did not want its distributors and jobbers to handle surplus bearings

p. 25, *infra*). The Commission, of course, paid no attention to this point in its appraisal of the evidence.

The testimony as to the circumstances surrounding the cancellation was of especial importance, therefore, in determining whether these cancellations were made in furtherance of an exclusive dealing policy or because of the failure of distributors and jobbers to buy Timken bearings for any one of a number of reasons.

The point is clearly made in respect to twelve exhibits (cancellation forms), that were offered by the Commission, numbered Exhibits 165-C through 165-N. These all related to a company in Denver, Colorado, known as the B. K. Sweeney Company, which had in addition to a main store in Denver, eleven branches in other towns in Colorado. The answer given to the question in all these forms was, "Have taken on Bower through Federal-Mogul." While the Commission's case was being presented, this was referred to by Commission's counsel as the horrible example of Timken's enforcement of an exclusive dealing policy. When Timken put on its defense in the case, among the witnesses who were called was Mr. George Sweeney, a Vice President of the B. K. Sweeney Company. Mr. Sweeney testified as to why *his firm had decided* to handle Bower through Federal-Mogul *and not to carry Timken*. He was cross-examined by counsel for the Commission at some length. This testimony was more than a little revealing. He was asked:

> "Q. Did you discontinue handling the Timken line?
>
> A. Yes.
>
> Q. You were not discontinued by Timken?
>
> A. No, we took on the Bower line and in that business, it's hard enough to stock one line without worrying about two so it just disappeared." (II P. A. p. 443a.)

The testimony of the Timken representatives who participated in the cancellation of the Sweeney Company also appears at that point in Petitioner's Appendix, and it indicates that far from desiring to cancel the Sweeney Company, the Timken representatives did their best to persuade the Sweeney Company to continue to handle the Timken line.

With some variations, this story was repeated at least a hundred times in the testimony that was offered in the case. Let us look at a few examples as they are shown in Appendix 8 of III P. A. starting on Page 752a. Commission's Exhibit 166-D showed the reason for cancellation of the dealer's contract of Valley Industrial Supply Co. as "signed a contract with Harold Swanton for Bower." This was an account that had produced from $1200 to $1800 worth of business annually in the years 1946 through 1949, inclusive. There were *no purchases* in 1950 prior to the date of cancellation on the 24th of May, 1950. The Timken branch manager in Los Angeles testified that they quit Timken and took on Bower to get a special kind of business (Kaiser steel mill bearings) that they could get by handling Bower bearings but could not get by handling Timken bearings.

The report of cancellation stated:

> "Stock is rundown and consists of Tyson and ABC as well as Timken. Uncooperative."

Commission's Exhibit 166-L involved Auto Parts Depot of Temple, Texas. This was an account whose business had ranged in 1947 to 1950 from $300 to over $500. In 1951, the amount of business dropped to $72. The cancellation was dated July 3, 1951. The salesman who handled the account testified that he was told that they were going to buy ABC bearings (a competitor's) at a

lower price, and were going to do that rather than maintain an adequate Timken inventory.

Commission's Exhibit 168-E involved a firm known as E. C. Swain, Spencer, Iowa. The answer to the cancellation question was "Took on Bower." This account had produced business from $193 to $787 in three years, 1948-1950. The salesman who handled this account testified that they were buying other Federal-Mogul-Bower lines and decided to buy roller bearings as well. At the time of the cancellation the stock was almost entirely Bower. The cancellation took place on December 4, 1952, and in the years 1951 and 1952 they made *no purchases of Timken bearings.*

Commission's Exhibit 168-J involved the cancellation of Lowery Company, Bay City, Michigan. The answer to the question was "they decided to take on Bower as an AD." This account had produced from $468 to $735 of business in the years 1949 through 1952. They were cancelled on May 28, 1953; during 1953 they had purchased $85 worth of Timken bearings. At the time of the cancellation they had three times as many Bower bearings as Timken bearings in stock and they said that they were buying Bower bearings because they could get them at a better price.

It is clear that all the oral testimony was of tremendous importance in determining whether the statements made in the cancellation reports had any significance in showing a policy of exclusive dealing in the case. The Commission simply dismissed this testimony, with the remarkable statement that "respondent has failed to weaken the probative value of the documentary evidence adduced in support of the Complaint." (Commission's Findings, Paragraph 6, Petitioner's Brief, Appendix C, p. 4c.)

The Commission dealt with this subject in a most extraordinary fashion and one which, of course, the Court of Appeals did not accept. In the course of the Commission's opinion it was said that:

> "One of the reasons advanced by the witnesses and accepted by the hearing examiner as a basis for his ruling was that the contracts were terminated because of the customers' low volume of purchases. Documentary evidence introduced by respondent indicates that in *some* instances, customers had made very few purchases of Timken bearings for several months or a year prior to cancellation. With respect to these accounts, *however, it appears that respondent had been aware of their purchase records but did nothing to cancel them until they started purchasing from a competitor.*" (Petitioner's Appendix 51-A.) (Emphasis added.)

Then a further statement appears in the Commission's Opinion. Referring again to the purchase records, the Commission said:

> "An examination thereof discloses that, in many instances, any appreciable decrease in purchase volume occurred just one or two quarters prior to cancellation. In our opinion, this decrease did not supply the motive for termination, but was the natural result of the purchaser's action stated on the report as the basis for cancellation, that is, that the purchaser had commenced buying from a competitor."

Thus, in the Commission's view, if a manufacturer was aware of the fact that the customers did not purchase from it, but waited for some time before cancellation was effected, that was evidence of exclusiving dealing,—at least, if in the interim the customer had started purchasing from the competitor. On the other hand, if the cancellation was effected promptly, the motive for termination

was the purchaser's action in buying from a competitor. In other words, in the Commission's view, if a Timken distributor or jobber discontinued his purchases of Timken bearings and began purchasing other brands in lieu of Timken, Timken could *never* properly terminate his contract, whether it did so promptly or only after it was very obvious that no further purchases would be made from Timken.

Generally there was no evidence in the record as to when a distributor or jobber actually started handling competitive bearings. In any event, it would be of no significance, for certainly there is no rule of law that precludes a manufacturer from cancelling a contract with a distributor or jobber who is no longer interested in buying his product, whether that lack of interest is occasioned by taking on another line or whether it is simply a case of disinterest in the business of the manufacturer.

The balance of the Commission's exhibits, relating to approximately 35 accounts, was in the form of reports from salesmen in the field that in general related to the appointment of jobbers or distributors.

The Commission followed the same procedure in the brief filed in this Court as it has consistently followed in dealing with exhibits, and that is to take a brief excerpt from an exhibit, read into it an exclusive dealing purpose, and disregard all testimony relating to it. Commencing on p. 5 and continuing thru p. 11, this technique is followed with a small concession to the oral testimony by a brief reference to it in footnotes. The combination falls far short of giving a fair picture of all the evidence. The inadequacy of the method followed is easily shown by summarizing the record as to two cases referred to.

On page 9 of the Commission's brief reference is made to a portion of a sentence that appears in a report from

the Branch Manager of Timken in San Francisco having to do with the appointment of Green Motor Parts as a distributor of Timken bearings. There is a brief supplement in footnote 16 on page 9 of the Commission's brief as to this case.

The following items of undisputed testimony demonstrate the complete lack of evidence of exclusive dealing in connection with this matter. There were three witnesses who testified and whose testimony appears in II P. A. pp. 312a through 330a.

1. Green Motor Parts had been a Bower distributor and in the year 1951 had purchased a business at Corcoran, California, known as Corcoran Auto Supply, which for a substantial period of time had been a Timken distributor. (II P. A. p. 312a.)

2. Mr. Turner, Timken's Branch Manager in San Francisco, and Mr. Green testified that in the latter part of 1951 there was some discussion between Mr. Turner and Mr. Green as to whether this concern was going to continue to handle Timken bearings at the Corcoran location and Bower bearings at the rest of its stores, or what their program was going to be. Mr. Green stated that no final decision was made on the matter at that time. (II P. A. p. 327a.)

3. Green testified that late in 1951 an order was sent to Timken for Timken bearings from the Corcoran store, and both he and his operating personnel were pleased to find that the entire order was filled by Timken, which was in contrast with orders that had been sent to Bower where they were accustomed to receiving only 50% of what they ordered. (II P. A. p. 314a.) A second order was sent in after the 1st of January and they had a similar experience with having the order filled. (II P. A. p. 314a.)

A second sales call was made on this Company by Mr. Turner after January 1, 1952, at which time the representatives of Green Auto Parts, Messrs. Green and Harmanson, said they had determined to use Timken as a source of supply of tapered roller bearings in all their stores. (II P. A. p. 328a.)

There is absolutely no evidence of any coercion or threats on the part of Timken in connection with the matter. On the contrary, at the time Green announced this decision, they had a substantial stock of Bower bearings and as to it there was no condition imposed by Timken that it be disposed of (II P. A. p. 316a.) On the contrary in 1955, three years after the contract was made, an additional supply of Bower bearings was purchased in an exchange of the slow moving Bower numbers then in their stock for faster moving Bower numbers. (II P. A. p. 316a.) These he said were disposed of in the ordinary course of business.

4. As a matter of fact Mr. Green said they still buy Bower bearings monthly. (II P. A. 315a.)

5. Mr. Green testified that they had previously represented and handled Tyson bearings, and that when they changed over to the Bower lines sometime before 1951 they handled the matter in exactly the same fashion as they did when they changed to the Timken line in 1951—that was, to dispose of the Tyson bearings as rapidly as they could and fill in with Bower bearings. The reason was that it was *their policy* not to handle *more than one* line of any type of merchandise because they had approximately 30,000 part numbers in their warehouse and they could not afford to duplicate their stock. (II P. A. pp. 317a, 321a and 325a.)

Thus, it is apparent that the entire evidence relating to Commission's Exhibit 73, from which the quotation was

taken in the brief filed before this Court, far from sustaining the Commission's position, directly controverts any exclusive dealing practice so far as Green Motor Parts is concerned.

On page 9 of the Commission's brief there is a quotation from Commission's Exhibit 134, a report made by Timken's branch manager in Los Angeles to Colyear Motor Sales. What happened in respect to this account is very simple. Colyear Motor Sales wanted Timken to appoint this concern as a Timken jobber in the City of Whittier, California. The stock of merchandise which Greenleaf Auto Parts had at that time was composed of bearings of several different makes, including Timken, and also *included surplus bearings.* (II P. A. p. 380a.)

Timken does not want its distributors or jobbers to handle surplus bearings, which are second-hand bearings bought from various distress sources such as bankruptcy sales and surplus sales of various kinds. There is no assurance as to the condition of such bearings, and it is Timken's policy not to permit its jobbers and distributors to handle such surplus bearings for purely commercial reasons. This view has nothing whatsoever to do with exclusive dealing. The difficulty was explained by Mr. Halderman on P. A. p. 301a, that such product is not first class and may result in a combination of parts from surplus bearings with parts of new Timken bearings with attendant problems of liability on Timken; that handling surplus bearings may also result in Timken suffering a loss by reason of its exchange with distributors and jobbers of slow moving bearings under its obsolescence policy for more active parts, as a result of which it would take in some surplus bearings at full price. (II P. A. p. 381a.) Clearly the report made to Colyear Motor Sales by the San Francisco Branch has nothing to do with exclusive dealing. The record

shows without dispute that Greenleaf Auto Parts was never cancelled and is still a Timken jobber.

With one exception the complete exhibits from which the excerpts were tak[illegible]s they appear on pages 6, 7, 8, 9, 10, and 11 of the C[illegible]mission's brief are shown at the page references to Petitioner's Appendix, and on succeeding pages all other testimony relating to these exhibits appears. We respectfully refer the Court to these references. We submit that an examination of the complete exhibits and the evidence will show a repetition of what has been demonstrated in the outline of the two exhibits set forth above.

The Handling of Competing Bearings by Timken Distributors and Jobbers.

It is to be remembered that in the Complaint it was charged that Timken had a "consistent policy" of requiring distributors and jobbers to handle only Timken products. In addition, the Complaint also charged that Timken required its jobbers and distributors to dispose of any competing products which they were found to have in their stock.

As for the presence of competing bearings in the stocks of Timken distributors and jobbers, the evidence is simply overwhelming that that is a commonplace thing. The 40 odd witnesses, Timken branch managers and salesmen who testified on the subject, gave their estimate of the percentages of distributors and jobbers having competing bearings in their stocks, and in some cases the quantity of competing bearings. Their testimony is summarized in Appendix 5, I P. A. p. 252a, 253a. These estimates ranged from 35% to 95% of the distributors and jobbers in the territories of the various representatives of Timken having competing bearings in stock. As is shown in Section 3,

I P. A. p. 137a there were 34 distributors and jobbers who testified to the fact that they handled competing makes of bearings and had never been threatened with cancellation by Timken for so doing.

The statement was contained in the Commission's Opinion that:

> "The testimony of respondent's current distributors and jobbers discloses that in practically all instances, they were carrying Timken products to the exclusion of competitor's products except for the 'emergency' or 'accomodation' 'purchases above mentioned" (I P. A. p. 58a).

How this statement can be supported in view of the great mass of testimony that was offered in this case is beyond comprehension. Indeed, the record showed, as the Court of Appeals clearly observed, that in *most* instances Timken distributors and jobbers *were* handling competing makes of bearings. In any event, one cannot understand how the Commission can sustain a complaint charging a "consistent policy" of exclusivity when it must immediately undertake to explain away evidence that denied exclusivity, on the ground that in these cases Timken chose not to enforce what was supposed to be "a consistent policy." After all, this case was based entirely upon the *alleged enforcement* of an exclusive dealing *policy* and not on exclusive dealing conditions contained in a contract.

Moreover, the observation of the Commission on this point is not even approximately correct, for there were many instances of witnesses,—distributors, and jobbers testifying that they had continued to buy competitive bearings after they were appointed Timken distributors. We respectfully refer the Court to the testimony that is reproduced in the Appendix of the *following* witnesses who testified on this subject: Sherman Evans, I P. A., pp. 61a-

74a; John A. Rohrs, I P. A., pp. 74a-82a; Claude Middleton, I P. A., pp. 82a-91a; Thomas L. Huckle, I P. A., pp. 91a-100a; W. T. Manning, I P. A., pp. 108a-114a; Ernest A. Wildermuth, I P. A., pp. 114a-119a; R. John Moore, I P. A., pp. 119a-123a.

In the brief filed in this Court, the Commission said that:

> "This evidence tended to show that the handling of competitive bearings took place on the following circumstances: (1) to enable the gradual reduction of competitive stocks following appointment as a Timken dealer; (2) to handle emergency needs, that is to say, to fill an order where there may have been delay in obtaining Timken bearings; and (3) to accommodate a valued customer who makes a specific request for another brand."

A fine sample of a "consistent policy" of exclusive dealing enforced as was charged in the Complaint!

The record shows as to Item (1) that Timken did not impose any time requirement as to the disposition of competitive stocks. Not only was this done at the convenience of the distributor or jobber and because of his policy of not carrying more than one line of tapered roller bearings, but in many instances the distributor or jobber purchased additional competitive bearings to effect disposal of obsolete items which had been in his stock at the time the appointment was made.

The Decision of the Court of Appeals was Based in Substantial Measure on an Application of the Rule that a Seller has the Right to Select Customers.

The decision of the Court of Appeals in this case turned substantially on this point. The Court said first:

> "Moreover, Timken introduced evidence showing that in each and every one of the cancellation instances referred to in the documents relied upon by the Commission, the dealer in question had brought about his own cancellation by either failing to purchase any Timken bearings for a long period of time, or by requesting that he be cancelled." (Page 4a, Appendix A, Com. brief.)

Further on in the Opinion, the Court said:

> "*Nor can the documents alone be substantial evidence of such a policy, inasmuch as, even if these reports show that Timken cancelled dealers' accounts because they were dealing in competitive bearings, this alone is not illegal.* Perhaps the rule has best been stated for our purposes in the following language: 'The antitrust laws do not prohibit a manufacturer or distributor from selecting dealers who will devote their time and energies to selling the former's products and a manufacturer is not compelled to retain dealers having divided loyalties adverse to the interests of the said manufacturer or distributor. *McElhenny Co., Inc. v. Western Auto Supply Co.*, 167 F. Supp. 949, at page 954, affirmed 269 F. (2d) 332 (C. A. 4)." (Emphasis added.)

The italicized portion of the Court's Opinion is the nub of the matter. The Court simply did not agree that the statements in the cancellation reports or in the other exhibits *standing alone* could make out a case of exclusive dealing.

The right to select customers is protected by the Clayton Act, itself, 15 U. S. C. A. Section 13. This Court in *United States vs. Colgate & Company*, 250 U. S. 300 and in *Times-Picayune Publishing Company vs. United States*, 345 U. S. 594 clearly upheld the existence of the right.

Indeed, in the Court of Appeals Opinion, in this case, the Court said:

> "To uphold the order entered by the Commission in this case would be, in effect, to destroy this right."

It is just common sense that as a corollary to the right of selection of customers as outlets for his products the seller must have the right to cease dealing with any customer who does not live up to the seller's expectations in the efforts he devotes to the sale of his products. This is especially so when the sales effort of the customer is being devoted largely to other products or even to products of a competitor. We are dealing in this case with a product that is practically standardized and where the seller's products are interchangeable with those of competitors. Under such circumstances, the bare cancellation of a dealer, because of his refusal to put his primary sales efforts on the products of Timken, could not by any reasonable interpretation be regarded, standing alone, as evidence of exclusive dealing.

When consideration is given to the matters outlined in the Statement of Facts section of this brief, such as the likelihood of a dealer confining his inventory largely to a single line, or the unwillingness of a dealer to maintain an inventory consistent with the requirements of the seller, or where there was a difference in a discount rate, the voluntary choice of a dealer not to handle Timken products, and Timken's cancellation of such an account as its distributor or jobber, certainly involves no violation of the law.

In the final analysis, the evidence presented in this case, on any reasonable evaluation, shows that at the time the contracts of distributors and jobbers were cancelled, Timken had no longer any reasonable expectation that these distributors or jobbers were going to devote any significant amount of time to the sale of Timken bearings or to make any significant purchases of bearings from Timken. Under such circumstances no fair appraisal of the evidence could come up with the conclusion that the cancellations of such accounts were in support of a policy of exclusive dealing in violation of Section 3 of the Clayton Act.

As was pointed out by the Court of Appeals, the Commission's conclusion would in effect destroy the right of a seller to select its customers and would in fact impair the right of any seller to pursue a vigorous sales policy in the distribution of its products for resale. Surely the Court of Appeals in its appraisal of the evidence applied the provisions of the Clayton Act correctly and avoided a result that would have followed from an affirmance of the Commission's opinion, namely, a substantial lessening of competition, because it would then have been impossible to compete vigorously for the business of distributors and jobbers without violating the law as interpreted by the Commission.

The Commission's Contention that Timken's "Predominant Position" Should Have Been Considered by the Court of Appeals.

The Commission's second principal contention is that in "assessing the weight to be given the testimony" the Court of Appeals "failed to take *adequate account* of Timken's predominant industry position," and "gave no consideration to that critical fact for any purpose whatever."

The first answer to this proposition is that it is based upon a pure assumption on the part of the Commission. The relevant market for the sale of replacement bearings is not confined to the sales made by the independent distributor and jobber organizations of the tapered roller bearing manufacturers. The record shows that a high percentage of manufacturers of original equipment containing bearings have dealer organizations who handle tapered bearings in the replacement market which they purchase from the original equipment manufacturers.

One of the witnesses called by the Commission testified that there were in excess of 50,000 automobile dealers in the United States and in excess of 20,000 dealers in agricultural equipment, most of whom sell tapered bearings in the replacement market. He was asked what percentage of the market was covered by the sales of Timken, Federal-Mogul-Bower and SKF Tyson, and he said that it was impossible to make any determination.

At the time of the presentation of the case, the Commission was proceeding on the basis that the Hyatt Company, a General Motors subsidiary, was not a factor in the tapered roller bearing market. The record shows that Hyatt manufactured roughly 10% of the total tapered roller bearings produced for original installation; and that since General Motors supplied more than one-half of the automobiles sold in the United States market, the replacement business which was done in connection with their sales would be a substantial portion of the replacement market.

Thus, the assumption now made that Timken has a predominant position in the relevant market, simply because it sells more bearings in the replacement market through its independent distributor jobber organizations than its competitor bearing manufacturers sell through

their distributor jobber organizations, cannot be sustained in view of these other important factors in this market.

The second answer to this contention is that it is pure speculation on the part of the Commission to make such a statement. This is readily apparent from the petition filed in this Court, where this contention is repeatedly prefaced by such qualifying phrases as "so far as its opinion discloses," "The Court *apparently* thought," or "justifies the assumption that." (Petition, pp. 22 and 23.) The Commission thus concedes that the Court below *has not made any statement* to the effect that Timken's size or relative position in the industry had no bearing on the determination of this case.

On the contrary, all the evidence presented before the Commission regarding these facts was included in the record filed with the Court of Appeals for its review, and this point was repeatedly stressed in the brief filed by the Commission with the Court of Appeals and in oral argument before that Court. Without some very clear statement from the Court of Appeals, rejecting this evidence or minimizing its importance in this case, the Commission is totally unwarranted in *assuming* that the Court did not consider this evidence equally with all other evidence in the record.

Petitioner's real objection would seem to be that the Court of Appeals did not, in its written opinion, review the evidence in detail and make more specific comments regarding particular aspects of the evidence. There is, of course, nothing in the rules of the Court nor in any statutes or decisions governing its procedure, which requires the Court to do this; and in a case of this type, where the evidence was concerned with more than a hundred different transactions in the appointment or cancellation of distribution or jobbers, and the evidence relative to these

transactions included almost 200 exhibits offered by the Commission, an equal number of exhibits offered by Timken, and almost 3000 pages of transcript of oral testimony (most of it by witnesses called by Timken), it would be a monumental task for the Court of Appeals to discuss the evidence in any detail. Indeed, to single out only a portion of the evidence and to place special emphasis on that portion would be in conflict with the duty of the Court, in reviewing an order of the Commission, to determine whether its findings are supported by substantial evidence in the record considered as a whole. *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474; Section 11(c) of the Clayton Act, 15 U. S. Code, Section 21(c).

Therefore, the absence of specific comment by the Court of Appeals regarding Timken's position in the industry cannot fairly be taken to indicate that the Court "fail(ed) to come to grips with these questions," as Commission would have us believe.

A third, and perhaps even more significant, answer to this contention is that it is directly in conflict with the principles set forth in the recent decision of this Court in the case of *National Labor Relations Board v. Walton Manufacturing Company*, 7 L. ed. 2nd 829, 82 S. Ct. 30. In reversing a decision by the Court of Appeals for the Fifth Circuit, this Court held that the lower court erred in applying a *special test* of the substantiality of the evidence before the Board in reviewing cases involving reinstatement with back pay, as compared with other types of cases, and stated:

> "There is no place in the statutory scheme for one test of the substantiality of evidence in reinstatement cases and another test in other cases. NLRB v. Pittsburgh S. S. Co. 340 U. S. 498, 95 L. ed. 479, 71 S. Ct. 453, and the Universal Camera Corp. Case, each de-

cided the same day, were cases involving reinstatement. They state a rule for review by Courts of Appeal in all Labor Board cases. * * *"

The two dissenting members of this Court did not disagree with this statement of principle, but merely asserted that the Court of Appeals had *not* "applied an erroneous standard of review or grossly misapplied the correct standard" in the case before the Court.

Although it will undoubtedly deny this, the Petitioner's contention in this case really amounts to a request for a "special rule" for the review of orders of the Commission in cases involving a respondent which has what Petitioner chooses to call a "position of overwhelming dominance in its industry." Petitioner would have this Court say that a *lower standard of proof* of an alleged offense may be accepted in a case against such a respondent than would be sufficient against some other respondent charged with the same offense. As a rule of general application, this would obviously be unsound and contrary to this Court's declaration in the *Walton Manufacturing* case, *supra*.

The supposed justification for such a "special rule" in this case is that Timken's position in the industry was such that "its dealers will naturally be reluctant witnesses against its restrictive practices," so that the Commission was unable to secure any direct testimony of witnesses to support its charges. This claim is particularly specious in the present case, where by far the largest part of the Commission's case was based on instances where Timken had *canceled* its contracts with distributors or jobbers, *allegedly* (according to the Commission) for the reason that they refused to handle Timken's bearings exclusively. *These* distributors and jobbers, no longer having any business relationship with Timken, surely would not be "re-

luctant" witnesses against Timken; if anything, common sense and experience would indicate that they would be anxious to testify, if they believed that Timken had acted unfairly or contrary to law in cancelling their contracts.

The ephemeral nature of this argument becomes apparent when it is recalled that the Commission introduced the cancellation forms as exhibits at a hearing on May 17, 1957. The record was closed in the case on September 23, 1959. In the interim period of more than two years, hearings were held before the Trial Examiner in the areas where the businesses were located that were referred to in the cancellations. The record fails to show any effort on the part of the Commission to procure the attendance of a representative of any one of the firms referred to in the cancellations as a witness either in support of its case in chief or on rebuttal. Thus there is no factual basis in the record for the notion now expressed that the cancelled distributors or jobbers would be "reluctant" witnesses against Timken.

Actually two such distributors or jobbers (as to one of whom the Commission had offered 12 different exhibits), called as witnesses *by Timken*, testified that the cancellation had in fact been initiated *by them*, for the reason that they had decided to handle another line of bearings *in lieu of (not in addition to)* Timken. The testimony of one of these witnesses, Mr. Sweeney, and the facts relative to the cancellation of the Sweeney Co. were reviewed at p. 18 *supra*.

A second witness, E. J. Ayer, who testified about his cancellation said unequivocally that *he initiated* the cancellation for business reasons explained in his testimony, II P. A. 559a-561a.

Obviously, such witnesses would not help the Commission in attempting to prove its case, but not because

they were *reluctant* to testify *against* Timken (no longer being a Timken distributor or jobber), but rather because the facts as shown by their testimony completely destroyed the probative force of 13 exhibits on which the Commission was relying.

The one live witness called by the Commission (and even then purportedly only on rebuttal) in regard to Timken's alleged exclusive dealing policy was also a former distributor who had been cancelled by Timken and who testified that he "attributed" his cancellation to the fact that he submitted a bid to supply bearings other than Timken on a contract with the city and county of San Francisco. (He did not even claim that he had been so advised by Timken.) The evidence presented by Timken showed that the real reason for the cancellation was entirely different, namely, this distributor's unwillingness to carry an inventory of Timken bearings.

However, this one instance demonstrates that the Commission was not deprived of *potential willing witnesses* by any intimidating effect of Timken's position as a leader in its industry; and the other two instances referred to above indicate that the only reason why the Commission was unable to secure witnesses to support its charge was the fact that Timken had not acted unfairly or contrary to law in carrying out any cancellation of contracts with distributors and jobbers.

In any event, the question before the Court is not whether the Commission may have problems of proof *in the future*. The argument now made is that the Commission should be excused from making out a case because it may be difficult. Certainly there is no legal basis for such a position.

The supposed need for a "special rule," either as to the weight of the evidence or as to the acts which establish

a "consistent policy" of exclusive dealing in violation of Section 3 of the Clayton Act, to be applied only in cases involving "an industry giant" (to use another of Petitioner's incriminating designations), simply does not exist in the present case, even if it were not so completely at odds with any proper concept of the administration of justice.

It is also argued that "a massively dominant firm" may be able to enforce an exclusive dealing arrangement by more subtle means that "firms with less economic leverage" would need to employ. This agreement may at first impression sound reasonable; but the fallacy of the argument is that there is a violation of Section 3 of the Clayton Act only if there is a "condition, agreement or understanding" that the purchaser will not deal in the products of a competitor of the seller. This requires that there be some form of a meeting of the minds between the seller and the purchaser in regard to this point—an expression of some kind by one of the parties that the sale is made on such a "condition, agreement or understanding," and an assent thereto by the other party. Of course, that expression and that assent may take many different forms; from an express provision in a formal written contract, through a general circular letter setting forth such a policy on the part of the seller, to a simple statement by a representative of the seller and an acquiescence by the purchaser. The *readiness* of the purchaser to accept such a condition, agreement or understanding may be affected by the economic power of the seller, but the *method* by which the condition, agreement or understanding is established is not necessarily any different merely because of any difference in the size of the seller. In any case, it is essential to show by substantial evidence that such a condition, agreement or understanding has in fact been made; and in the present case that has not been done.

CONCLUSION.

In this case there has been one appellate review by a court in which the Congress has reposed final jurisdiction, in the absence of a showing of a conflict of opinion on federal questions, the existence of a question arising under the United States Constitution or some clearly exceptional circumstance. We have gone into some detail to show that the Court of Appeals that reviewed the record in this case understood the rule that should be applied in examining the findings and order of the Commission and properly applied this rule. The reviewing court certainly understood what it called "our limited scope of review" and said that it was applying the rule and that the order of the Commission "must be set aside as not supported by substantial evidence on the record considered as a whole."

Our review of the evidence was also intended to show that there were no questions warranting the attention of this Court and to paraphrase the language of Mr. Chief Justice Vinson in an address before the American Bar Association in 1949, the record in this case presents no question "whose resolution will have immediate importance beyond the particular facts and parties involved."

If this Court were to allow a writ of certiorari in this case, simply because an agency of the Government is dissatisfied with the judgment of a Court of Appeals which has carefully reviewed a record of its proceedings, it would be departing from sound and long-established principles as to the exercise of this Court's reviewing jurisdiction, and seriously undermining the confidence which it has heretofore built up in the ability and integrity of the Courts of Appeals. If there is *ever* a case where such a departure is justified, or where a Court of Appeals has failed to merit that confidence, *this is not that case.*

We therefore respectfully urge that the Petition for a Writ of Certiorari in this case be denied.

Respectfully submitted,

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No. 255

In the Supreme Court of the United States

OCTOBER TERM, 1962

FEDERAL TRADE COMMISSION, PETITIONER

v.

TIMKEN ROLLER BEARING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER

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As we pointed out in the Petition (Pet. 18–21), the fundamental error of the court below lies in the fact that it made "its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences" (*Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 73)—a function that has been reserved by Congress to the Commission. A perfect illustration of that defective process is reflected in Timken's effort to defend the decision below by carefully selecting, for somewhat more detailed treatment in its Brief in Opposition (Br. Opp. 22–26), two of the episodes on which the Commission's charge was based.[1] By picking only so much of the evidence

[1] These two episodes were discussed at p. 9 of the Petition.

and by drawing only such of the possible inferences as support its own conclusions, Timken has managed to portray these episodes in a largely innocent light—just as the court below did as to Timken's whole course of conduct by employing the same invalid technique. However, a fair and objective examination of the full record relating to this very pair of episodes discloses that there is *other* evidence not discussed by Timken, and that there are *other* inferences reasonably to be drawn. In the following paragraphs, we discuss some of the additional evidence and alternative inferences—not for the purpose of debating the merits of the question whether Timken's conduct violated the antitrust laws, but to demonstrate through these examples (chosen by Timken) that it was only by improperly substituting its own judgment on the weight of the evidence and on the inferences to be drawn therefrom that the court below was able to conclude that the Commission's order "is not supported by substantial evidence in the record considered as a whole" (Pet. App. A, p. 6a).

1. The Commission's evidence established that Timken's San Francisco Branch Manager called on Green Motor Parts (a Bower distributor), which had just purchased Corcoran Auto Supply (a Timken jobber), and made the following written report to Timken (Tim. App. 310a–311a):

> When I contacted them soon after the announcement was made that they were purchasing the Corcoran Auto Supply, they indicated they would be willing to retain Timken in the

> Corcoran branch, but did not want to relinquish the Bower franchise in the five other outlets. Since that time we have made as thorough an investigation as possible of the possible replacements in Corcoran, and our consensus was that Green Motor Parts offered the greatest possibilities. Accordingly we arranged for an interview with Mr. Green and Mr. Hermanson and they have told us they would be very pleased to drop the Bower line in all of their outlets and go 100% Timken.

This documentary evidence provided a reasonable basis for the inference that (1) when Timken learned that Green did not wish to sell Timken exclusively in all of its stores, Timken began to look for "possible replacements" for the one store in which Green *did* wish to retain the Timken franchise; and (2), when Green learned of this, in order to retain the Timken franchise in that one store, Green reluctantly consented to "drop the Bower line in all of their outlets and go 100% Timken." Considered in the light of the other evidence as to Timken's policies and practices (see Pet. 5–14), it lent substantial support to a conclusion that Timken enforced a policy of refusing to grant dealerships unless the dealer would handle Timken exclusively.

Timken points out (Br. Opp. 23) that this dealer, in the hearings held some five years later,[2] explained that his reason for switching from Bower to Timken had been that two trial orders he placed with Timken

[2] The dealer had some difficulty in recalling all of the circumstances, because they happened "quite awhile ago" (Tim. App. 319a).

were completely filled, whereas his shipments from Bower had always been incomplete (Tim. App. 314a, 321a–322a). However, in evaluating this latter-day gloss upon the Branch Manager's report, the Commission was entitled to take into account these facts: (1) This dealer was a Timken distributor as of the time of the hearings (see Tim. App. 318a). (2) Although he had been a Bower distributor for five years prior to his switch to Timken (Tim. App. 312a) and Bower had during that entire period failed to fill his orders satisfactorily (Tim. App. 323a), this dealer had never before sought to obtain a Timken distributorship (Tim. App. 318a), and, as recently as the beginning of the discussions described in the Branch Manager's report, he "did not want to relinquish the Bower franchise" in his old stores (Tim. App. 311a). (3) Even if the dealer had suddenly changed his mind and decided he wanted to take on a Timken franchise covering all of his stores, this, of course, does not establish on what conditions or with what understanding *Timken* was willing to enter into such an arrangement.

The dealer testified that the decision to carry Timken bearings exclusively was not "based in any way upon any threat * * * that [he] had to go Timken 100 percent in all [his] stores to get the Timken line at all" (Tim. App. 314a–315a); the Branch Manager also testified that the dealer's prompt disposal of his Bower line had not been imposed on the dealer as a "condition in connection with granting him a distributor agreement" and that there was no "agreement" to that effect (Tim. App. 329a–330a). However, the dealer testified to an "understanding" be-

tween him and the Branch Manager: it was "completely understood" that, if he "switched over" from Bower to Timken, he would "dispose of Bower as fast as [he] could and fill in with Timken" (Tim. App. 319a–320a). It is also noteworthy that (according to the testimony of both the dealer and the Branch Manager), when the dealer later wished to make an exchange of bearings with Bower (see Br. Opp. 24), the dealer had to discuss the matter with Timken's Branch Manager (Tim. App., 316a–317a), who told him that the proposed exchange would be "acceptable" to Timken (Tim. App. 329a).[4] Thus, even apart from the incriminating and inadequately explained documentary evidence of record, this testimony provided the Commission with ample support for a conclusion that Timken had extracted an exclusive-dealing "understanding" from this dealer and that it had policed the dealer's compliance with that agreement.

2. The Commission's evidence further established that Timken's Los Angeles Branch Manager, in a letter informing a distributor of the planned appoint-

[3] Of course, Section 3 of the Clayton Act (38 Stat. 731, 15 U.S.C. 14), under which Timken was charged, prohibits not only any "condition" or "agreement" for exclusive dealing but any "understanding" as well.

[4] Timken points out (Br. Opp. 24) that the dealer has continued to purchase Bower bearings regularly; however, what Timken fails to point out is that the dealer testified unequivocally that these were solely "emergency" purchases (Tim. App. 324a, 326a). See Petition herein, pp. 13–14, 16, 23, n. 30. In this connection, it is relevant to note that, notwithstanding whatever outside purchasing he did, the dealer in question plainly regarded himself as being a "100 percent Timken" dealer (see Tim. App. 314a–315a).

ment of a new jobber in the distributor's territory, stated (Tim. App. 379a):

> We reserve the right to review this account within a reasonable length of time to determine if they have disposed of their assorted stock of tapered roller bearings. We believe that any concern who advertises themselves as an authorized jobber for Timken roller bearings should be one in fact.

From this documentary evidence the inference could reasonably be drawn that Timken had consented to the appointment of this jobber only upon the condition or understanding that he dispose of any competitive bearings "within a reasonable time" and that Timken intended to police compliance with that arrangement. Like the previous example, this evidence provided valid support (taken together with many such examples) for a conclus on that Timken enforced a policy of exclusive dealing against its present and potential jobbers and distributors.

Timken urges (Br. Opp. 25–26) that at the hearings the Branch Manager testified that this jobber's stock had included surplus, or secondhand bearings and that there are legitimate business reasons for Timken's not wanting its dealers to carry such bearings. However, there is nothing upon the face of the letter to suggest that it was concerned only with surplus bearings; it appears to contemplate the disposition of all competitive bearings, so that the dealer could be an authorized Timken jobber "in fact." Moreover, the Branch Manager's testimony made it quite clear that the "assorted stock" referred to in the letter was not

in fact limited to surplus bearings: in describing this particular jobber's stock, he said, "They had an assorted stock of tapered bearings of several different makes, including some Timken" (Tim. App. 380a), and it was only when Timken's counsel asked him whether the stock included any surplus bearings that he added, "Yes, surplus bearings, and those of other manufacturers, such as ABC" (*ibid.*). Furthermore, in explaining Timken's concern as to the character of a jobber's stock, he testified (Tim. App. 381a):

> "We are also interested in the sales angle. We want their business, and we can't get their business if they handle these other miscellaneous makes of bearings.

Thus, the Commission's documentary evidence was, if anything, bolstered by the witness's testimony in supporting a conclusion that, as a condition to the appointment and continuance of a dealer as an authorized jobber, Timken required—and oversaw—the prompt disposal of competitive bearings.

The contrast between the foregoing analysis of these two episodes and that presented by Timken in its Brief in Opposition amply demonstrates, at the very least, that evidence can be found and inferences drawn to support each of two diametrically opposed conclusions concerning Timken's course of conduct: the Commission's, that it amounted to exclusive dealing; and the court's, that it did not. The question is thus posed: whose function is it to evaluate the evidence and draw the inferences, the court or the administrative agency? The answer, long settled by this Court, is that Congress assigned to the Commis-

sion the duty of determining the facts and, to that end, of appraising the evidentiary record. By taking over that function itself, the court below committed an error of such magnitude that, in view of the economic importance of this case (Pet. 17–18, 21–23), review by this Court is clearly called for.

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